

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SMARTCOMM LICENSE SERVICES, LLC et al.)	File Nos. 0005608009, 0005608012,
)	0005608015, 0005608511-14, 0005608516,
Petitions to Deny Applications filed by Abundant)	0005608520-22, 0005608524-25, 0005608527-
Ephesian 3:20 Spectrum, LLC, Prosperity Group,)	29, 0005608531, 0005609341, 0005956635-39,
LLC, Air Apparent Associates, LLC, Choice)	0005956641, 0005957460, 0005959458
Communications, LLC, Janus Spectrum Group,)	
LLC, Innovative Group, LLC, TD Spectrum, LLC,)	
and Ketchum Enterprises, LLC)	

ORDER

Adopted: January 16, 2014

Released: January 16, 2014

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. This *Order* addresses petitions filed by Smartcomm License Services, LLC (“Smartcomm”), Michael D. Judy (“Judy”), Coyote Communications, LLC (“Coyote”), and Spectrum Acquisitions Group, LLC (“SAG”) (collectively, “Petitioners”) to deny the above-captioned 800 MHz Specialized Mobile Radio (SMR) Service applications of Abundant Ephesian 3:20 Spectrum, LLC (“Abundant”), Prosperity Group, LLC (“Prosperity”), Air Apparent Associates, LLC (“Air Apparent”), Choice Communications, LLC (“Choice”), Janus Spectrum Group, LLC (“JSG”), Innovative Group, LLC (“Innovative”), TD Spectrum, LLC (“TD”), and Ketchum Enterprises, LLC (“Ketchum”) (collectively, “Janus Applicants”).¹ As discussed below, we dismiss the petitions in part and deny the petitions in part, and will process the applications accordingly.

I. BACKGROUND

1. Frequency coordinators are private entities certified by the Commission to recommend the most appropriate frequencies for applicants in designated radio services.² They must provide coordination services on a non-discriminatory basis and process applications in order of receipt.³ Frequency coordinators may utilize outside engineering firms to perform the required technical analyses.⁴

2. As part of the rebanding of the 800 MHz band to resolve interference between commercial and public safety systems, the Commission created the Expansion (815-816/860-861 MHz) and Guard (816-817/861-862 MHz) Bands in order to provide spectral separation between commercial licensees operating in the enhanced SMR band operating above 817/862 MHz and public safety licensees operating

¹ Petition to Deny (filed Feb. 19, 2013) (“February Petition”); Petition to Deny (filed Sept. 27, 2013) (“September Petition”).

² Wireless Operations in the 3650-3700 MHz Band, *Memorandum Opinion and Order*, ET Docket No. 04-151, 22 FCC Rcd 10421, 10428-29 & n.48 (2007). There are ten certified frequency coordinators for the 800 MHz General Category and SMR Pools. See http://wireless.fcc.gov/services/index.htm?job=licensing_3&id=industrial_business.

³ See Frequency Coordination in the Private Land Mobile Radio Services, *Report and Order*, PR Docket No. 83-737, 103 F.C.C. 2d 1093, 1119 ¶ 53 (1986).

⁴ See American Mobile Telecommunications Association, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 12416, 12422-23 ¶ 14 (WTB PSPWD 2001).

below 815/860 MHz.⁵ Expansion and Guard Band channels become available for licensing when the Public Safety and Homeland Security Bureau and the Wireless Telecommunications Bureau (the Bureaus) announce that the required level of clearing has been achieved in a particular region.⁶ Frequency coordinators must address and resolve conflicting Expansion and Guard Band applications through a “pre-coordination” notification process.⁷ Specifically, in order to avoid mutually exclusive applications, each frequency coordinator must provide notification of each application submitted to it for coordination to all other participating coordinators prior to filing the application with the Commission. In the event of conflicting applications, the application with the earliest notification date and time stamp takes precedence when frequency choices are made.⁸ The later applicant must delete the conflicting channel, or utilize an engineering solution to eliminate the conflict from its application.⁹

3. On November 27, 2012, the Bureaus announced that band reconfiguration was complete in eleven regions, and that Expansion and Guard Band channels in those regions would be available for licensing on January 17, 2013, and pre-coordination could commence on December 11, 2012.¹⁰ Petitioner Smartcomm acts in a consulting capacity to assist clients with obtaining Commission licenses, including by filing applications and arranging for engineering support.¹¹ On behalf of the other Petitioners and additional applicants that are not listed as parties to this proceeding, it submitted applications for Guard Band frequencies to frequency coordinator AAA Frequency Coordination (“AAA”) through AAA’s engineering contractor, starting on November 27, 2012.¹² Janus Spectrum, LLC (“Janus”), was formed to assist applicants wishing to utilize channels within the 800 MHz Guard Band (as well as other spectrum) to offer mobile services in selected U.S. markets.¹³ On behalf of the Janus Applicants, it submitted applications for Guard Band frequencies to frequency coordinator Manufacturers Radio Frequency Advisory Committee, Inc. (“MRFAC”) through MRFAC’s engineering contractor on December 4, 2012.¹⁴ The engineering contractor for both AAA and MRFAC is RadioSoft.

4. Smartcomm’s clients and the Janus Applicants sought mutually exclusive Guard Band frequencies in Colorado, Hawaii, Iowa, and Minnesota. Petitioners assert that Smartcomm submitted their applications to RadioSoft before the Janus Applicants’ applications were submitted.¹⁵ RadioSoft explains that it does not co-mingle frequency requests processed for AAA and frequency requests

⁵ See Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, WT Docket No. 02-55, 19 FCC Rcd 14969, 15053-55 ¶¶ 154-58 (2004) (“800 MHz Report and Order”).

⁶ See Improving Public Safety Communications in the 800 MHz Band, *Order*, WT Docket No. 02-55, 23 FCC Rcd 15966, 15972-73 ¶ 17 (2008).

⁷ 800 MHz Report and Order, 19 FCC Rcd at 15053-54 ¶¶ 156-57.

⁸ See, e.g., Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Channels in Non-Border Regions Relinquished by Sprint Nextel Corporation in the 809.5-815/854.5-860 MHz Band, *Public Notice*, WT Docket No. 02-55, 27 FCC Rcd 14785, 14789 (PSHSB 2012).

⁹ *Id.*

¹⁰ See Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau Announce the Completion of 800 MHz Band Reconfiguration in Certain NPSPAC Regions, *Public Notice*, WT Docket No. 02-55, 27 FCC Rcd 14775, 14780 (PSHSB/WTB 2012) (“Bureaus Public Notice”).

¹¹ February Petition at 5.

¹² *Id.* at 6.

¹³ Opposition at 1-2 (filed Mar. 6, 2013) (“Janus Opposition”).

¹⁴ *Id.* at 5.

¹⁵ February Petition at 7.

processed for MRFAC, so the requests at issue were in separate processing queues.¹⁶ Smartcomm submitted significantly more Guard Band requests to AAA than Janus submitted to MRFAC, so the Smartcomm requests were in a longer queue.¹⁷ Consequently, RadioSoft completed pre-coordination notification to the other frequency coordinators for the Janus requests before Smartcomm's requests,¹⁸ and a number of Janus Applicants' applications were filed with the Commission on January 17, 2013 to the exclusion of mutually exclusive requests submitted by Smartcomm.¹⁹ Petitioners filed a petition to deny the Janus Applicants' applications on February 19, 2013.

5. On September 6, 2013, most of the Janus Applicants' Colorado applications²⁰ were dismissed because they did not meet the minimum distance separation required by the Commission's Rules,²¹ and their other Colorado applications were returned for correction of technical errors and later withdrawn.²² On September 24, 2013, the Janus Applicants filed new applications for Colorado.²³ Petitioners filed a petition to deny these applications on September 27, 2013.²⁴

II. DISCUSSION

6. *Standing.* First, we examine Petitioners' standing. Smartcomm states that it filed the instant petitions on behalf of all of its clients whose applications were not filed with the Commission due in whole or in part to the filing of the Janus Applicants' applications, including prospective applicants that are not listed as parties to the petitions.²⁵ Petitioners cite no authority for the proposition that Smartcomm, which is not even listed as the licensee contact on the applications, has standing to assert claims before the Commission on behalf of parties that it assisted in submitting applications. We conclude that Smartcomm itself has no standing to challenge the Janus Applicants' applications, and dismiss the petitions with respect to Smartcomm.²⁶

¹⁶ See Janus Opposition at 6, Exhibit 5.

¹⁷ *Id.*; Letter dated June 6, 2013 from Peter Moncure, President, RadioSoft to Marlene H. Dortch, Secretary, Federal Communications Commission at 1 ("Moncure Letter").

¹⁸ The record indicates that RadioSoft specifically advised Smartcomm that its applications might not be processed immediately in light of the expected volume and compressed schedule created by the *Bureaus Public Notice*, and Smartcomm released RadioSoft from any claims arising from its coordination services. See *id.* at 1, Attachment. Janus argues that the indemnification agreement supports denial of Smartcomm's petitions, as Janus was an intended third-party beneficiary that can enforce the agreement. Reply to Smartcomm Letter Submission at 4-6 (filed July 29, 2013). We agree with Smartcomm, however, that the agreement relates only to civil liability to be adjudged in a court of competent jurisdiction, and does not preclude us from adjudicating the instant pleadings relating to pending applications before the Commission. See Letter dated Aug. 9, 2013 from John L. Flynn, Counsel for Smartcomm License Services, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission at 2-3.

¹⁹ In a smaller number of instances, applications submitted by Smartcomm were filed to the exclusion of mutually exclusive applications submitted by Janus. Moncure Letter at 2 n.1.

²⁰ File Nos. 0005608513, 0005608516, 0005608520, 0005608521, 0005608525, 0005608528.

²¹ See 47 C.F.R. § 90.621(b)(4).

²² File Nos. 0005608524, 0005608529. The applications were withdrawn on September 14, 2013. The February Petition is thus moot with respect to the dismissed and withdrawn applications.

²³ File Nos. 0005956635-639, 0005956641, 0005957460, 0005959458.

²⁴ The September Petition incorporates by reference the arguments made in the February Petition. See September Petition at 2-3.

²⁵ See February Petition at 5 n.15.

²⁶ This conclusion obviously calls into question Janus's standing to file oppositions to the petitions on behalf of the Janus Applicants, but we need not resolve that issue because in denying the petitions we have not relied on the

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7. Regarding the remaining Petitioners, we note the Commission has held that an entity's mere status as an applicant ordinarily does not confer standing.²⁷ These decisions provide that an applicant lacks standing to challenge another party's application where the basis for standing is a claim that the petitioner will incur harm if its application is granted and the challenged application is granted, because the claimed harm is too speculative.²⁸ In this case, however, rather than arguing that they would be harmed by grant of the Janus Applicants' applications, Petitioners assert that they were harmed by the *filing* of the Janus Applicants' applications, which they argue wrongfully denied them an opportunity to apply for the same frequencies. We conclude that these Petitioners have standing under these circumstances – but only with respect to the Janus Applicants' applications that were mutually exclusive with, and thus blocked the filing of, their applications. According to information submitted by the Petitioners, only six of the above-captioned applications blocked the coordination and filing of requests submitted by Smartcomm on behalf of the other Petitioners.²⁹ We therefore dismiss the petitions with respect to the other captioned applications.³⁰

8. *Mutually Exclusive Applications.* Petitioners' claim that the Janus Applicants' applications were improperly processed ahead of theirs assumes that all of the applications received by RadioSoft should have been processed sequentially in a single queue.³¹ We disagree. Petitioners cite no authority for their assertion that we should treat separate frequency coordinators as a consolidated entity if they utilize the same contractor, or its alternative suggestion that we should treat all frequency coordinators as a single entity for purposes of determining filing priority.³² Nothing in the Commission's

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arguments presented in the Janus Opposition. *See, e.g., Warren C. Havens, Order on Reconsideration*, 25 FCC Rcd 511, 511 n.3 (2010).

²⁷ *See, e.g., Applications for A and B Block Broadband PCS Licenses, Memorandum Opinion and Order*, 11 FCC Rcd 17062, 17065 ¶ 7 (1996).

²⁸ *See, e.g., Application of KIRV Radio, Memorandum Opinion and Order*, 50 FCC 2d 1010 ¶ 2 (1975) ("the claim of potential economic injury by a mere applicant for a broadcast facility is too remote and speculative to show standing as a 'party in interest'").

²⁹ Specifically, it appears that Abundant's application File No. 0005956636 conflicted with Coyote's request for frequency 861.1125 MHz in Colorado, Air Apparent's application File No. 0005608015 conflicted with Judy's request for frequency 861.4125 MHz in Minnesota, Innovative's application File No. 0005956638 conflicted with Coyote's request for frequency 861.1375 in Colorado, Ketchum's application File No. 0005608511 conflicted with SAG's request for frequency 861.8375 MHz in Hawaii, Ketchum's application File No. 0005608512 conflicted with SAG's request for frequency 861.8375 MHz in Iowa, and Ketchum's application File No. 0005609341 conflicted with Judy's request for frequency 861.3875 MHz in Minnesota. *See Declaration of Carole Downs*, attached to February Petition; *See Reply* ("Smartcomm Reply") at Exhibit A (filed Mar. 19, 2013).

³⁰ Because we dismiss the petitions with respect to the Prosperity, Choice, JSG, and TD applications, we need not consider Smartcomm's proffered information regarding the principals of Choice and JSG, *see* Letter dated July 30, 2013 from John L. Flynn to Marlene S. Dortch, Secretary, Federal Communications Commission, or its complaint that Choice and JSG amended their applications without serving Smartcomm as required by Section 1.927(i), 47 C.F.R. § 1.927(i), *see* Letter dated Sept. 20, 2013 from John L. Flynn to Marlene S. Dortch, Secretary, Federal Communications Commission at 1.

³¹ *See, e.g., Smartcomm Reply* at 11 ("RadioSoft is a single coordinator with an obligation to process all applications it receives in order of receipt.").

³² *See id.* at 12 ("even if MRFAC and AAA are treated as distinct coordinators, the Commission's first come, first served mandate still required that coordinators determine priority based on the order in which applications were received by *any* coordinator after the Public Notice date"). Moreover, this argument is refuted by the supplemental authority that Petitioners present, City of Aventura, Florida, *Memorandum Opinion and Order*, 28 FCC Rcd 4439 (PSHSB PD 2013) (*Aventura*). *See Notice of Supplemental Authority* (filed Apr. 19, 2013). In that matter, two coordinators provided pre-coordination notification of conflicting frequency requests at different times on the same day, then both filed applications based on those notifications. The Public Safety and Homeland Security Bureau's

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rules or policies compels RadioSoft to process applications it receives on behalf of all coordinators in a single queue, so long as applications are processed in the order received on a per-coordinator basis.

9. Petitioners also assert that the Janus Applicants' Colorado applications, filed after the dismissal and withdrawal of their initial Colorado applications, are junior to Petitioners' mutually exclusive frequency requests and should be dismissed.³³ This is incorrect. A frequency request submitted to a coordinator that is not coordinated due to a prior coordination and does not result in a filed application does not perpetually prevent the filing of any overlapping application in the event that the first-coordinated application is not granted.

10. *Eligibility.* Petitioners argue³⁴ that the Janus Applicants' applications are deficient because they did not provide evidence that the applicants were already engaged in activities that made them eligible for Industrial/Business Pool frequencies under Section 90.35(a) of the Commission's Rules.³⁵ We conclude that the indication in the applications that the Janus Applicants intend to provide radio service to Part 90 eligibles demonstrates eligibility for these SMR frequencies under Section 90.603(c) of the Commission's Rules,³⁶ notwithstanding the applications' reference to Section 90.35 rather than 90.603.³⁷

11. *Real Party in Interest.* Petitioners also allege that the Janus Applicants failed to disclose required ownership information. Specifically, Petitioners argue that the Janus Applicants' Form 602 (FCC Ownership Disclosure Information for the Wireless Telecommunications Services) submissions omit necessary information regarding the real parties in interest and the Janus Applicants' owners.³⁸

12. Applicants must list the real party or parties in interest in the applicant or application, including entities directly or indirectly controlling the applicant.³⁹ Petitioners argue that Janus has an attributable interest in each of the Janus Applicants that was not disclosed in their Form 602s, because Janus has an exclusive marketing agreement whereby if a Janus Applicant elects to sell, lease, or otherwise dispose of its spectrum, Janus will receive an eighteen percent commission.⁴⁰ We conclude that

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Policy Division concluded that the applications were properly dismissed due to the coordinators' failure to resolve the mutual exclusivity. See *Aventura*, 28 FCC Rcd at 4442-43 ¶ 10. We conclude that *Aventura* does not bear on the instant dispute, where the frequency coordinators resolved the mutual exclusivity and did not transmit mutually exclusive notifications or coordinate mutually exclusive applications. We agree with Petitioners, however, that this goes only to the weight to be given the supplemental authority, and is not grounds to strike the supplemental pleading. See Opposition to Motion to Strike at 2 (filed May 8, 2013). We therefore deny Janus's Motion to Strike (filed May 1, 2013).

³³ See September Petition at 2; see also Letter dated Sept. 20, 2013 from John L. Flynn to Marlene S. Dortch, Secretary, Federal Communications Commission at 2-3.

³⁴ February Petition at 11.

³⁵ 47 C.F.R. § 90.35(a).

³⁶ 47 C.F.R. § 90.603(c).

³⁷ See *Viking Dispatch Services, Inc., Order*, 10 FCC Rcd 12769, 12772 ¶ 16 (WTB 1995) (denying a request to permit initiation of dispatch service on Industrial/Land Transportation frequencies and stating that the applicant could seek SMR frequencies to commence the contemplated service to Part 90 eligibles). We note that Petitioners provide no more evidence of eligibility in their 800 MHz SMR applications. See, e.g., FCC File Nos. 0005609013 (SAG; "applicant to provide wireless services to Part 90 eligibles"), 0005609658 (Coyote; same).

³⁸ Smartcomm Petition at 12, citing 47 C.F.R. §§ 1.919(b)(1), 1.2112(a); Smartcomm Reply at 5.

³⁹ 47 C.F.R. §§ 1.919(a), 1.2112(a)(1).

⁴⁰ See February Petition at 13.

the exclusive marketing agreement does not make Janus a real party in interest. We are not persuaded that the exclusive marketing agreement between Janus and its clients for a Janus commission triggered by any future transaction involving the license *after* authorization rises to the level of an attributable interest requiring disclosure at the application stage, for it does not appear from the record that Janus is in a position to compel any transaction regarding these licenses.

13. Each Janus Applicant is a limited liability company (LLC). LLCs must disclose the name of any party holding at least ten percent of their stock.⁴¹ Petitioners assert that the Janus Applicants' Form 602s are deficient because they disclose only the name of each LLC, and do not list the parties that own at least ten percent of each LLC.⁴² Petitioners do not, however, identify any party that owns more than ten percent of any of the Janus Applicants or any Janus Applicant of which more than ten percent is owned by any one party. Rather, Petitioners assert that they "understand that the applicants are all either owned or controlled by at most only a handful of individuals."⁴³ We conclude that Petitioners have not demonstrated that the Janus Applicants' ownership disclosures were deficient.⁴⁴

14. In addition, Petitioners note that the Securities and Exchange Commission (SEC) has initiated an investigation into whether Janus is violating federal securities law.⁴⁵ Petitioners argue that this demonstrates that Janus is the real party in interest in the applications and that the Janus Applicants lack the fitness of character to hold Commission licenses.⁴⁶ We conclude that this preliminary investigation, which may or may not lead to formal SEC action, does not provide a basis for reaching such conclusions.⁴⁷

15. *Emission Bandwidth.* Finally, Petitioners note that the Janus Applicants' applications propose operation with emission designator 4K00F1E.⁴⁸ From this, Petitioners infer that the Janus Applicants improperly intend to operate on channels with center frequencies 6.25 kilohertz apart.⁴⁹ Petitioners have misinterpreted the applications. Emission bandwidth differs from channel spacing. The Janus Applicants propose to operate on standard channel centers; they merely propose to use less than the maximum permitted bandwidth, which violates no Commission rule.

⁴¹ 47 C.F.R. §§ 1.919(a), 1.2112(a)(2).

⁴² See February Petition at 13.

⁴³ *Id.*

⁴⁴ See, e.g., William J. Kirsch, *Order on Reconsideration and Memorandum Opinion and Order*, 28 FCC Rcd 15280, 15288 ¶ 19 (2013) ("Although Mr. Kirsch claims to have offered 'substantial and compelling evidence' that the public interest standard was met, his assumptions about the requested documents are wholly speculative and thus fail to meet the public interest standard.").

⁴⁵ See Letter dated Dec. 2, 2013 from John L. Flynn to Marlene S. Dortch, Secretary, Federal Communications Commission at 2. Janus submitted an opposition to this letter on January 15, 2014.

⁴⁶ See *id.* at 1-2.

⁴⁷ See Policy Regarding Character Qualifications in Broadcast Licensing, *Policy Statement and Order*, 5 FCC Rcd 3252, 3252 ¶ 7 (1990) ("it is appropriate to refrain from making licensing decisions based on mere allegations of relevant non-FCC misconduct, even where those allegations have resulted in an indictment or are otherwise in the process of being adjudicated by another agency or court").

⁴⁸ The emission designator is a series of alphanumeric characters that denotes the necessary bandwidth, type of modulation, nature of the signal modulating the main carrier, and type of information to be transmitted. See 47 C.F.R. §§ 2.201(b), 2.202(b).

⁴⁹ See February Petition at 14.

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), and Sections 1.41 and 1.939 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.939, the Petition to Deny File Nos. 0005608009, 0005608012, 0005608015, 0005608511-14, 0005608516, 0005608520-22, 0005608524-25, 0005608527-29, 0005608531, and 0005609341, filed by Smartcomm License Services, LLC, Michael D. Judy, Coyote Communications, LLC and Spectrum Acquisitions Group, LLC on February 19, 2013, and the Petition to Deny File Nos. 0005956635-639, 0005956641, 0005957460, 0005959458 filed by Smartcomm License Services, LLC, Michael D. Judy, Coyote Communications, LLC and Spectrum Acquisitions Group, LLC on September 27, 2013, ARE DISMISSED IN PART and DENIED IN PART as set forth above, and applications File Nos. 0005608009, 0005608012, 0005608015, 0005608511, 0005608512, 0005608514, 0005608522, 0005608527, 0005608531, 0005609341, 0005956635, 0005956636, 0005956637, 0005956638, 0005956639, 0005956641, 0005957460, and 0005959458 SHALL BE PROCESSED consistent with this *Order* and the Commission's Rules.

17. IT IS FURTHER ORDERED that the Motion to Strike filed by Janus Spectrum, LLC on May 1, 2013 IS DENIED.

18. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau